REME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 6 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 40

JAMES CONWAY,
Petitioner,

vs.

CALIFORNIA ADULT AUTHORITY, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Reply Brief for Petitioner

CHARLES STEPHEN RALSTON
1095 Market St., Suite 418
San Francisco, Calif. 94103
Attorney for Petitioner

INDEX

		Page
I.	The factual contentions made by Respondents	1
II.	*North Carolina v. Pearce* requires reversal of the decision below	4
III.	The Court of Appeals below, and therefore this court, had jurisdiction over Petitioner's Application for a Certificate of Probable Cause	5

TABLE OF AUTHORITIES CITED

Cases	Pages
Fitzsimmons v. Yaeger, 391 F. 2d 849 (3rd Cir. 1968)	6
House v. Mayo, 324 U.S. 42 (1945)	2
Kapsalis v. Wilson, 380 F. 2d 365 (9th Cir. 1967)	5
Lawrence v. Wainwright, 401 F. 2d 177 (5th Cir. 1968)	5
Mempa v. Rhay, 389 U.S. 128 (1967)	3, 5
Mihailoviki v. California, 364 F. 2d 808 (9th Cir. 1966)	6
North Carolina v. Pearce, 395 U.S. 711 (1969)	4, 5
Poe v. Gladden, 287 F. 2d 249 (9th Cir. 1961)	5
Williams v. Kaiser, 323 U.S. 471 (1945)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 40

JAMES CONWAY,

Petitioner,

vs.

CALIFORNIA ADULT AUTHORITY, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Reply Brief for Petitioner

This reply brief will respond to certain issues raised for the respondent for the first time in its brief on the merits.

I.

THE FACTUAL CONTENTIONS MADE BY RESPONDENTS

In their brief respondents seek, for the first time in this case, to dispute the facts set out in the petition for a writ of habeas corpus. They attempt to do this by making general allegations in the brief itself and by seeking to introduce

certain exhibits purporting to show that the Adult Authority revoked petitioner's sentence for good cause and that it has been following constitutionally valid procedures when it revokes or redetermines sentences.

The respondents themselves, however, admit in their brief that for the purposes of this Court's decision the allegations of the habeas corpus petition filed below must be taken as true. *House v. Mayo,* 324 U.S. 42 (1945); *Williams v. Kaiser,* 323 U.S. 471 (1945). The lower courts denied habeas corpus and refused to issue certificates of probable cause because they concluded that as a matter of law the habeas petition on its face failed to state facts that raised a federal constitutional question. It is clear that the facts as alleged were taken as true.

Therefore, the question before this Court is a legal one; if the allegations of petitioner are true, is he being held in violation of the constitution. If this Court answers in the affirmative any dispute as to the facts would be up to the district court to resolve on remand. Unquestionably, this Court does not sit to resolve any such dispute and it could not do so on the present record. Further, it should be pointed out that the exhibits that respondents are now attempting to introduce do not support their position. In their brief they have virtually admitted the central point of petitioner's first argument, i.e., the Adult Authority may not act arbitrarily or capriciously when it revokes a previously determined sentence. But, it is claimed, the Authority revoked the two five-year terms because petitioner got into a scuffle over some dominoes with another inmate. Moreover, as of 1964, constitutionally valid procedures were put into effect. A few comments are in order.

First, respondents' exhibits do *not* reflect that this altercation was the reason for redetermining petitioner's sentences. They only show that discipline (three days in isolation) was imposed and that the matter was placed on the June, 1961, calendar of the Adult Authority. There is no record of any finding or holding that this incident was the basis for refixing the sentences.

Second, even assuming that the procedures set out in the 1964 resolution of the Adult Authority are being followed now, they were simply not in effect as of June, 1961, when the Authority acted in petitioner's case. Moreover, the resolution is itself ambiguous as to whether the procedures there set out are in fact followed in *any* cases. Thus paragraph IIII. (Respondents' Brief, Exhibit E, p. xii) states that:

> *Normally,* the Adult Authority will not take any final Determinative Action Rescinding . . . a term fix unless the respective inmate has been given a personal appearance hearing by a panel of the Adult Authority.

Whether these procedures are followed now and what procedures were applied in petitioner's case are, of course, factual issues which cannot be resolved here; suffice it to say that the petition for habeas corpus puts into issue the adequacy of the procedures afforded petitioner.

Third, the procedures set out in the 1964 resolution are woefully inadequate to meet constitutional standards as set out in *Mempa v. Rhay,* 389 U.S. 128 (1967). As indicated above a term may be refixed without the prisoner's presence. No right to be represented by counsel, to confront accusers, to cross-examine witnesses, or to present evidence on one's own behalf is granted. Nevertheless, the Adult Authority may, and does, exercise its sentencing function by rescinding previously fixed terms without affording a prisoner any of these protections.

Finally, respondents' exhibits serve to illustrate petitioner's main point, i.e., California law gives the Adult Authority sweeping powers to act arbitrarily and to revoke sentences for the most capricious of reasons. The Authority did determine that petitioner should serve only the minimum sentences required by law, two five-year terms. According to the respondents it then resentenced him to life imprisonment because of a minor scuffle over some dominoes.

II.

NORTH CAROLINA V. PEARCE REQUIRES REVERSAL OF THE DECISION BELOW

Respondents in their brief urge that *North Carolina v. Pearce,* 395 U.S. 711 (1969), decided by this Court at the end of last term, requires an affirmance of the decisions below. On the contrary, *Pearce* established that absent unusual circumstances, the guarantee against double jeopardy prohibits the increasing of a fixed sentence. Petitioner urges that in light of *Pearce* the rulings below were erroneous and that at the least they should be reversed and this case remanded for a hearing on the allegations of his petition for writ of habeas corpus.

Pearce squarely ruled that before an increase of a sentence could stand the state had an affirmative duty to show that there was a valid reason for such an increase based on conduct "occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record . . ." 395 U. S. at 726. Here petitioner has alleged that *no* valid reason existed for the refixing of the terms previously set. Moreover, the record before this Court is lacking in any factual data such as contemplated in *Pearce.*

Again, the State of California has chosen to remove the actual sentencing function from the trial judge and to confer it on the Adult Authority. The constitutional protections that this Court has held control the exercise of that function must attach to the proceedings of the Authority. These protections include those enunciated both in *Mempa*, as discussed in petitioner's brief in chief, and in *Pearce* and therefore include the protection against double punishment for the same crime.

III.

THE COURT OF APPEALS BELOW, AND THEREFORE THIS COURT, HAD JURISDICTION OVER PETITIONER'S APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE

In their brief respondents, for the first time, challenge the jurisdiction of Judge Chambers of the Ninth Circuit, and therefore inferentially that of this Court, to consider petitioner's application for a certificate of probable cause. The decisions cited by respondents do not, however, support the conclusions they draw from them. In those cases the petitioner had apparently made no attempt to comply with the time limitations on applying for certificates from either the district court or the court of appeals. *Kapsalis v. Wilson*, 380 F. 2d 365 (9th Cir. 1967); *Poe v. Gladden*, 287 F. 2d 249 (9th Cir. 1961); *Lawrence v. Wainwright*, 401 F. 2d 177 (5th Cir. 1968).

Here, however, the facts are clearly otherwise. Petitioner filed a timely application for a certificate of probable cause in the district court, a prerequisite for filing a notice of appeal, on October 10, 1967 (A. 21). When this was denied he attempted to file a notice of appeal, which the clerk of the district court refused to accept (A. 24). He then filed an affidavit in the Ninth Circuit which was treated as an application for a certificate of probable cause and denied (A. 27).

Precisely this kind of procedure was held by the Third Circuit to fulfill the requirements for taking an appeal from a denial of habeas corpus. *Fitzsimmons v. Yaeger,* 391 F. 2d 849 (3rd Cir. 1968). In *Fitzsimmons* the court properly focused on the filing, within thirty days, of either a notice of appeal or an equivalent document, such as an application for a certificate of probable cause. Once that had been done, delays in applying to the circuit court for a certificate would not divest the court of its jurisdiction over the appeal. See also, *Mihailoviki v. California,* 364 F. 2d 808 (9th Cir. 1966).

Certainly this enlightened and liberal interpretation of the habeas corpus statutes should apply in the present case. Petitioner not only filed a timely application in the district court, but after it was denied he attempted to file a notice of appeal and papers in the Ninth Circuit. However, according to his affidavit he was thwarted by prison officials who interfered with his sending them out (A. 25). Judge Chambers accepted the allegations of the affidavit and properly treated it as an application for a certificate of probable cause and denied it on the merits. His action should be determinative on the question of the jurisdiction both of the Court of Appeals and of this Court.

Respectfully submitted,

CHARLES STEPHEN RALSTON
1095 Market St., Suite 418
San Francisco, Calif. 94103
Attorney for Petitioner